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Brief of Harmon, Glidden & Little 815

Supreme Court of the United States

Filed May 24, 1897

October Term, 1896.

Thomas M. Adams, and E. C. Means, Executors, Etc.,
Appellants,

vs.

Benjamin R. Cowen and Others, Trustees,
Appellees.

Brief Against Petition for Writ of Certiorari.

JUDSON HARMON,
of Counsel Appellants.

J. J. GLIDDEN,
H. P. WHITTAKER,
JOHN LITTLE,
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BRIEF AGAINST PETITION FOR WRIT OF CERTIORARI.

I.

The brief in support of the petition pays no heed to the settled rule and practice of this court with respect to its exercise of the power of review by certiorari.

Lau Ow Bew, Petitioner, 141 U. S. 583, 144 Id. 47.
In re Woods, 143 U. S. 202.

American Construction Co., vs. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372.

In the case last named the court, by Mr. Justice Gray, said (p. 383) that review by this court by certiorari "has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

The granting of the petition would involve a radical change in the practice and policy of the court. No reason is stated why this case should be reviewed, and none exists which would not apply to every contested case in which the amount involved is substantial.

II.

The only showing attempted in behalf of the petition is that the Circuit Court of Appeals erred in its conclusions.

While, for the reason just stated, we do not think this question now open for discussion, yet the judgment was so just and rightful that we are unwilling to appear reluctant to defend it.

The case is not stated in the brief either fully or fairly. The appellees are styled "persons claiming to be assignees of William Means." They are in fact merely trustees holding the interest of William Means in his father's estate for the benefit of his wife and children. These "persons" have and claim no interest of their own whatever.

Item 4 of the will (Rec. 47) made equal division among the children of the testator. It is plain from this and from Item 5, quoted in the brief, that the equal provision, which the testator had in view, had reference only to distribution under the will, without regard to what might have been received from him when the will was drawn or might be received thereafter. As the Circuit Court of Appeals said in its unanimous opinion by Judge Severens:

> "The language could hardly have been made plainer to indicate that the leading purpose of the testator was that the property which he should leave at his death, irrespective of what he might have advanced to them during his life, should be divided among the five persons named."

78 F. R. at p. 546.

It is not disputed that both before and after the making of the will all of the children of the testator had received from him large amounts in money and property, all of which was charged to them, as an indebtedness, by the testator on his books of account (Rec. 90). William received what he got in the same way and with the same legal result as in case of all the others. On one occasion

the testator divided a large amount equally among his children expressly as an advancement. On all other occasions what they received from him made them his debtors, but the effect of the 5th item was to discharge those debts so as to make an equal division of his property at his death without regard to such debts. Item 5 uses both words, "advances" and "advancements." The Circuit Court of Appeals said (p. 546):

> "He uses the word 'advances' in the sense of 'furnishing,' 'supplying,' in advance of the final distribution of his will. It is absurd to suppose that he used the word as equivalent to the technical word 'advancements,' for, in the face of the disposition to be made of his property at his death, he must have known that if, in the meantime, he should bestow property upon them, whether by way of gift or loan, it would not be an 'advancement,' as that word is used in legal phraseology. In the nature of things, it was not possible for him to have intended by 'advances' the same thing as 'advancements', for that involves an intention, at the time of supplying the money, that it shall be such. Besides, he uses that term indiscriminately to apply to what he had given and charged to his children before the making of the will, as well as to what he might thereafter charge them. The legacies of the equal provision were to be 'in addition' to such advances, and how could the testator be supposed to have used the word 'advances' in its technical sense, which involves a satisfaction or diminution of the legacy *pro tanto*, when he expressly declared that the legacies should be in addition to them? The testator intended that they should not be eaten away by what he should be moved to do for his children during his life. That will becomes operative upon the death of the testator. What this will then meant was this: Whatever the testator has helped his legatees to before this time, when distribution has finally come, though then a debt, is now forgiven. It is not in any manner to be accounted

for.' The equal distribution now to be made of what remains is 'in addition to said advances.' For the lack of a more suitable word, we have frequently used this word in this opinion to express a similar meaning to that for which the testator employed it."

It is not true, therefore, as stated in the brief, that under the construction of the Court of Appeals William Means gets a "double portion." His great and peculiar misfortunes caused his father to supply him with greater sums of money than he supplied to any other child, except John and perhaps Mrs. Culbertson. But the father made no change in his will on this account, and under it the trustees will receive exactly the same on account of William's share as the others get for their shares. It is attempted to figure out the double portion by excluding from the will, or denying to William, the provisions of Item 5, which as plainly contemplated possible inequality in the total amounts received during the life time of the testator as they provided for equality in distribution under the will. William derives no greater benefit from the operation of Item 5 of the will under the decision of the Court of Appeals than does his brother John.

Counsel states, as the basis of his argument, that "the fifth clause of the will does not cancel debts due from children to the testator, but that it relates simply to advancements." If that were true, then that clause would have no effect whatever, because every item charged in the accounts with his children referred to by the testator was a *debt*, so charged and treated by him, while the only *advancement* he made was *credited* to them in those accounts. (Record, p. 90–1.)

As the Court of Appeals said (p. 548):

> "Thomas W. Means was a man of strong character and fixed adherence to his plans in life. He was also a man of strong paternal affections, and had been accustomed to extend his assistance and support to all his children by employing his large means on every occasion of their need. It is incredible that he should have changed his attitude when William's

calamities came upon him. The latter had gained considerable distinction in life, and no doubt he felt sensible of the credit to the family which his son's attainments reflected. He was the character of man who would be likely to have taken pride in them. He did not then know what, if any, moral delinquency there was in William's transactions. He knew that his son was in financial distress, and he came forward, as was his wont, to help him out and re-establish him on solid ground. We are fully persuaded that we do him exact justice in refusing to believe that he then had a thought of inaugurating a new plan of dealing with William's expectancy. And if he did not then have such purpose, there is nothing in the evidence which would justify the belief that he at any time afterwards formed one."

The notes of William Means to his father, by which the executors undertook to wipe out his legacy, were not given at the time he received the sums named therein. They were obtained from him by reason of an afterthought of his brother John for the declared purpose on his part of saving William's interest from possible attacks by creditors. (Record, 280, Q. 115, 116, 117, 119; also, Record, p. 142, letter of Feb. 20; Record, p. 151, letter of Feb. 21, and Record, p. 278, letter of Feb. 24). It was afterward concluded by John and those who thereafter became executors that what William had so received ought to be charged against his future share of the estate, and thereupon, as was said in the opinion below:

"The defendants have exhibited extraordinary diligence in obtaining from William repeated renunciation of his claims. Some days before the testator's death they obtained one such, and then, upon the day of their appointment, they solemnly indorsed upon the instrument their acceptance of the same as administrators, notwithstanding he had in the meantime revoked it; and on later occasions they obtained like concessions, culminating in the receipt and order of October 16, 1890, now in controversy. Such activity

on the part of an administrator executing a will in procuring the surrender of one who, by its terms, is a legatee, excites suspicion that they were conscious of standing on dubious ground, and ill comports with the duties of one standing in the place of a trustee for all the parties in interest. It is a violation of his duty when an executor becomes a partisan for one legatee and sacrifices the other," etc. (P. 551.)

William's condition and the duties of the executors, who were both grandchildren of the testator, are thus described by the court (p. 552):

"William had lost all his property, and was in very straightened circumstances. Since his downfall he has been broken in spirit and wavering in his purposes. He seems at times to have been impressed that the administrators had a moral, if not a legal, claim upon him that he should yield up his legacy to the estate, and this claim was pressed and insisted upon by the administrators. That they had no such legal claim upon him we have already determined. His brother and sisters all being in affluent circumstances, and his own family in needy circumstances, that he should have voluntarily given up the whole of this large sum, with no mistake in regard to what his legal rights were, it is difficult to believe. It amounted simply to a gift to the administrators for the benefit of the other legatees, whose only claim rested on the bounty of the testator. Courts of equity view such transactions with distrust, and, if the circumstances indicate that the trustee has dealt with the beneficiary unjustly, will not hesitate to set them aside."

To this design of his brethren to diminish or wipe out Williams's share under the will, the testator himself was not a party. He had no knowledge of it or of the steps by which its accomplishment was sought. He was very old and almost blind. But though he had full possession of his faculties, he gave no sign of desire to change the provisions or policy of his will. The Court of Appeals

held that a debt from the legatee to the testator may be created "as an obligation independent of the absolution accorded by the will," but said (p. 546):

> "But we think, also, that, having regard to the manifest purpose of the testator, when this will was made, to hold a free hand to help his children during his life as their necessities might require, and then at the end to divide what remained of his property equally among them, the court ought to require clear proof of some distinct purpose, on the part of the testator, during the transactions when he furnished the helping means which are supposed to have created the debt, to put that debt outside of the pale of the forgiveness which he had written in his will. And it must have been his purpose, and not that of some other. Even an expectation on the part of the legatee that the moneys paid for his benefit would, in the end, come out of his share of the estate, would not change the situation, unless the testator himself had a corresponding intent. He was the master of his fortune, and if he did not lend his money with the intent that if not repaid in his lifetime it should be repaid to his executors, then it would fall under the provisions of this will. There is not to be found in this record any such clear proof of the purpose of the testator to establish by the furnishing of the financial help, which he did, to his son, an independent obligation on the son's part which, if not paid during his life, should not be condoned by the provision in his will."

III.

The receipt of October 16, 1890, which the bill sought to set aside, does not come within the principle relating to compromises of doubtful claims, which counsel seek to invoke. It was obtained from William Means by the executors shortly after their appointment as the culimination of the scheme to which they were parties, conceived and set on foot before the death of the testator, to deprive William of the benefit of Item 5, of the will. The principles which apply to it are correctly set forth in the passage

above quoted from the opinion of the Court of Appeal. The transaction was not one between persons acting under ordinary circumstances and relations. It was an attempt by executors to secure in binding form an assent by a legatee to the charge against his share of sums which were not so chargeable, to get from him a receipt for sums which he had not received from the executors. The paper was both attacked and defended in the pleadings, not as a settlemment, but as a false receipt taken by trustees from the *cestui que trust*.

Not only was the opinion of the Circuit Court of Appeals unanimous, but counsel obtained a careful reconsideration of the case by petition for rehearing, argued fully on brief, upon which an opinion was announced which has not yet been published. We append the opinion on rehearing as an appendix to this brief.

Respectfully Submitted,

JUDSON HARMON,
of Counsel for Appellees.

J. J. GLIDDEN,
H. P. WHITTAKER,
JOHN LITTLE,
of Counsel.

APPENDIX.

No. 367.

United States Circuit Court of Appeals.

SIXTH CIRCUIT.

BENJAMIN R. COWEN, EVAN F. WILLIAMS AND A. S. FRAZER, TRUSTEES, *Appellants*,

vs.

THOMAS M. ADAMS AND E. C. MEANS, ADMINISTRATORS WITH THE WILL ANNEXED OF THE ESTATE OF THOMAS W. MEANS, DECEASED, AND JOHN MEANS, *Appellees*.

Petition for rehearing.

Before LURTON, Circuit Judge, and HAMMOND and SEVERENS, District Judges.

SEVERENS, District Judge, delivered the opinion of the court.

The defendants, Thomas M. Adams and E. C. Means, as administrators with the will annexed, have filed a petition for a rehearing of this case upon the following grounds:

"First. Because the settlement of October 16, 1890, is decreed to be set aside upon grounds not alleged in the bill, and which were therefore not discussed by counsel for the petitioners at the argument.

"Second. Because upon the question whether the notes of William Means are forgiven by the fifth clause of the will there is a clear distinction, overlooked by the court, between the note of November 22, 1888, for $45,000, and the other notes covered by the settlement.

"Third. The petitioners believe and are so advised by their counsel that a consideration of arguments which, for the reason aforesaid, were not presented at the hearing, will lead this Honorable Court to a decision in their favor."

In the statement of the grounds and arguments appended to the petition and in support thereof, counsel, in addition to the suggestion of reasons relevant to the particular ground first stated, on which a rehearing is asked, go into a discussion of other matters involved in the merits of the case which have already been considered by the court and passed upon in the opinion hitherto filed. We do not deem it necessary to reconsider those matters, including the supposed distinction between the note of November 22, 1888, for $45,000, and the other notes covered by the settlement; and shall therefore attend only to the special matter alleged in the petition, which is substantially this: Whether the conclusion which we reached ought to stand, in view of the allegations contained in the pleadings. The ground of complaint is, that the settlement of October 16, 1890, between the administrators and William Means is alleged in the bill to have been made upon a fraudulent combination with William Means for the purpose of defeating the rights of the plaintiffs, and not that it was a fraud upon him as the court appears to have found it to be, and upon which latter view it is said the conclusion of the court rests; and thereupon it is contended that the decision is inconsistent with the allegations of the bill. We do not think this suggestion of inconsistency rests upon any solid ground. The material facts upon which the complainants' case was founded, and upon the proof of which their right to relief was made out, were these: The making of the will, the death of the testator, the assignment of William Mean's legacy to the complainants, and the giving of the receipt to the administrators by William Means without payment of the legacy, either to him or his assignees. These facts the bill avers. All the rest was defensive, and the burden of allegation and proof that the legacy had been paid or validly released was upon the defendants. This

burden was assumed and the defensive allegations pleaded in the answer of the administrators. It is true, as stated, that the complainants alleged in their bill that the defendants entered into a fraudulent combination with William Means by which they attempted to secure his receipt for his legacy, in fraud of complainants, and that in pursuance of said combination William Means executed the receipt; but the defendants denied these allegations in their answer and averred: "That the said receipt "was not executed or delivered in whole or in part "by reason or in persuance of the pretended fraudulent "agreement or combination in the bill set up, and "that no such combination was ever made, and they "deny each and every allegation in the bill in "respect thereof." And throughout they have strenuously maintained this averment. In the briefs filed and at the argument, counsel maintained that there was no such combination. This they probably felt bound to do in order to resist the effect of the alleged assignment of his legacy by William Means to his family, and the decree of the Greene County Court of Common Pleas. This court did not find that there was any fraudulant combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the benificiaries under the complainants' trust, and to that extent practically sustained the defendants contention; but upon other grounds held that the complainants were entitled to recover the amount of the legacy. The grounds upon which the court proceeded were strenuously contested, and in the printed and oral arguments were fully and elaborately discussed. What the defendants now contend for is that the complainants by an allegation in the bill which they deny the truth of, and which allegation is unproved, ought to be precluded from recovery upon other substantive and sufficient allegations of fact which the court has found to be established. We think it clear that this proposition can not be maintained, and that as no other new matter is submitted, the petition should be *denied.*